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No. 98-46

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This brief is submitted by petitioner Brotherhood of Maintenance of Way Employes ("BMWE") to reply to respondents' brief in opposition to BMWE's petition for a writ of certiorari for review of the Seventh Circuit's decision in *Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Railway Co., et al.*, 138 F.3d 635 (7th Cir. 1998).

I. RESPONDENTS HAVE MISCHARACTERIZED THE DECISION BELOW

Respondents have asserted that this Court should not grant BMWE's Petition because the Court below properly viewed the case as a garden variety "minor dispute." They claim that the Court of Appeals merely held that language of the contract provision in question (Article XIV—Travel Allowance) is ambiguous, and with evidence extrinsic to the agreement, the Railroads had shown their interpreta-

tion of the agreement to be arguable and the dispute minor. Brief in Opp'n at 5-6, 9-14. However, respondents have mischaracterized the Seventh Circuit's decision.

The District Court found the provision in the parties' agreement concerning travel expense allowances to be plain as to its scope of application. Pet. App. B at 28a. The District Court reviewed the language of Article XIV which described the characteristics of the employees it covered, and concluded that the plain language of Article XIV applies to all employees who travel between their worksite and their homes during the work season. *Id.* Indeed, the District Court found that the railroads apparently "concede[d], that the plain language of Article XIV of the CBA unambiguously applies to *all* traveling employees." [1] *Id.*

Respondents have argued that the Appeals Court differed with the trial court on the clarity of the scope of coverage of Article XIV, (Brief in Opp'n at 6, *citing* Pet. App. A at 6a, 13a and 14a), but the Court of Appeals stated "[w]ere we to view Article XIV in a vacuum, we would conclude, as the district court did, that the railroads' position is feeble," (Pet. App. A at 6a), that the "railroads propose a theoretically plausible distinction [between types of traveling employees], but one that has no basis in the text," that "[w]e would hold the railroads'

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[1] The Railroads claim that the district court "unaccountably" found that the Railroads had conceded that the agreement language is clear. Brief in Opp'n at 5, n.6. Although the Railroads maintained that the provision was susceptible to differing interpretations, they did not refute BMWE's showing that the definitional terms in the provision were clear. On cross-examination, the Railroads' witness conceded that the definitional terms had commonly accepted meanings. *See* Brief of BMWE to the Seventh Circuit (Feb. 12, 1997) at 5-12 (citing the transcript of the testimony of the Railroads' witness). Because the District Court's finding was premised upon its assessment of the evidence submitted, including the testimony of witnesses, the Railroads may not properly challenge that court's finding that they essentially conceded the plain meaning of the provision in question.

view 'frivolous or obviously insubstantial' and affirm the district court—if the act of interpretation were to stop at the four corners of the Agreement," and that "the railroads' position would be frivolous, if we could not incorporate sources of meaning beyond the Agreement itself." Pet. App. A at 7a.

Thus, the Seventh Circuit found the Railroads' position to be frivolous based on the contract language alone.

The Railroads assert that the majority below viewed the contract language as ambiguous because "the term 'employees' is not expressly defined" and that the minor dispute holding was predicated on that alleged ambiguity in the contract. Brief in Opp'n at 10, 12. However, the majority expressly based its holding on the bargaining history offered by the Railroads. The majority deemed that extrinsic evidence was sufficient to create ambiguity in otherwise clear language. The Court said that its purpose was to "ascertain whether the ostensible meaning of Article XIV—lucid and definitive as it might seem—is in fact the right one." Pet. App. A at 9a. It further stated that it was obligated to look "beneath the surface of that text" if bargaining history suggested latent ambiguity. Pet. App. A at 10a. Additionally, the majority's response to the dissenting Judge (as modified in the denial of the petition for rehearing en banc) stated that she "presents thoughtful policy arguments against considering any extrinsic evidence when the plain language seems clear. But the Rubicon has been crossed by the Third Circuit in *SEPTA* [*Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen*, 882 F.2d 778, 783-86 (3rd Cir. 1989)]." Pet. App. C at 39a. Finally, when the Court stated its holding it said "[b]ased on what the PEB said and how the parties had cast their views before it, we think that a latent ambiguity may exist in the Agreement, namely that the PEB meant only to refer to regional and system gangs. The railroads' interpretation therefore is 'arguably justifiable' and not 'frivolous'." Pet. App. A at 13a-14a, citation omitted.

Accordingly, the Court of Appeals did not find a minor dispute based on a determination that the terms of the agreement could arguably be read to support the Railroads' position. Nor did it hold that resort to extrinsic evidence was permissible because the agreement language was not clear. Rather, the Court below found a minor dispute even though it recognized the agreement language to be clear, and that finding was predicated solely on evidence other than the terms of the agreement.

II. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT THE COURT OF APPEALS APPLIED A MAJOR/MINOR TEST THAT IS AT ODDS WITH THE TEST ENUNCIATED BY THIS COURT, AND THAT FAILURE TO REVIEW ITS DECISION WILL UNDERMINE OPERATION OF THE RAILWAY LABOR ACT

Respondents have disputed BMWE's assertion that the Seventh Circuit applied a major/minor test that is fundamentally at odds with this Court's decision in *Consolidated Rail Corp. v. Railway Labor Exec's Ass'n*, 491 U.S. 299 (1989) ("*Conrail*") and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). Respondents claim that *Conrail* does not require that a carrier's minor dispute claim must be arguable *under the terms of the parties agreement*. They observe that the *Conrail* decision noted that various appellate courts had used the phrases "frivolous or obviously insubstantial" and "arguable" without following them with "under the terms of the agreement"; and that the Court cited appellate decisions that used other locutions such as "not arguably justified" and "spurious." Brief in Opp'n at 7-8, n.8. However, as is shown in BMWE's petition, (Pet. at 9-12), when this Court described its test and when it stated its holding, it repeatedly, expressly tied the arguability inquiry to the "terms of the parties' agreement." 491 U.S. at 307, 310, 320.

By arguing that *Conrail* requires that a carrier demonstrates that its contractual defense is arguable under the

terms of the parties' agreement, BMWE has not asserted, as the Respondents claim, (Brief in Opp'n at 7), that *Conrail* restricts courts to written agreements in making major/minor determinations. Rather, as the *Conrail* decision shows, a contractual defense may be predicated on either an express agreement or one implied from past practice. *See* 491 U.S. at 308, 311 (written agreement was silent as to the subject in dispute, but the Court determined that there was an implied agreement on the subject that arguably justified the carrier's actions; the Court did not look to non-agreement evidence in finding a minor dispute, but rather limited itself to the terms established by the past practice). Moreover, if the agreement terms are shown to be ambiguous and thus not dispositive of the dispute, then a court does not run afoul of *Conrail* by relying in part on evidence extrinsic to the agreement in deciding whether the carrier's interpretation of the contract arguably has merit. But, under *Conrail*, a court can not find a minor dispute under Section 3 of the RLA if the carrier's position is based solely on evidence other than the terms of the parties' agreement.

Furthermore, the *Conrail* decision explained why the carrier's arguability showing must be measured against agreement terms. The Court stated that the carrier's contract interpretation must be measured against the terms of the agreement because a finding of a minor dispute on "insubstantial grounds would be to undercut 'the prohibitions of § 2, Seventh and § 6 of the Act' against unilateral imposition of new contractual terms." 491 U.S. at 306. Thus, the holding that a carrier cannot prevail in a minor dispute claim if its position is not arguably justified by terms of the agreement was not an inconsequential linkage of the carrier's claims to the terms of the agreement, nor was it just one of a number of phrasings of the major/minor test; the linkage was a deliberate effort to avoid undercutting Section 2 Seventh of the RLA which prohibits unilateral changes in agreement

terms. 491 U.S. at 306; *see also Hawaiian Airlines v. Norris*, 512 U.S. ——, 129 L.Ed.2d 203, 219 (1994).

This balance between RLA Sections 2 Seventh and 3 tilts toward Section 3 because the Court placed a "relatively light burden" on carriers who defend unilateral change cases by asserting contractual defenses. However, the statutory scheme necessitated the requirement that the contractual defense be at least arguable under the terms of the contract. The contractual support need not be compelling or even persuasive, but if the claim does not even have a minimal level of support in the agreement Section 3 is inapplicable and the dispute is major. Accordingly, by deleting the terms of the agreement component from the major/minor determination, the court below applied a test that ignored this Court's careful balancing of Sections 3 and 2 Seventh of the RLA, effectively negating Section 2 Seventh.

Respondents have asserted that review of the decision below would only resolve the dispute between these parties under Article XIV of the recent national agreement between BMWE and the Railroads. Brief in Opp'n at 7, 9, 14. But the key question in the case was whether the Railroads could rely on bargaining history evidence to attempt to prevail on their minor dispute claim even though the agreement language was clear and unambiguous. If the Court of Appeals had agreed with the District Court that the Railroads could not make their case solely on bargaining history evidence, the District Court's decision would have been affirmed because the Seventh Circuit found the Railroads' position to be frivolous under the terms of the agreement. Pet. App. A at 5a-7a. Thus, the issue before this Court would not involve weighing of the evidence with respect to Article XIV, but rather resolution of the question of whether the Court of Appeals properly interpreted and applied the RLA and this Court's decision in *Conrail*.

BMWE submits that it is also significant that the Railroads support the Seventh Circuit's reliance on the Third Circuit's decision in *SEPTA*. Brief in Opp'n at 8. Because Respondents are every major railroad in the United States and because every major railroad can litigate in the Third Circuit or Seventh Circuit, the decision below will effectively displace *Conrail* as the standard for classifying RLA disputes, and Section 3 will completely overwhelm Section 2 Seventh if the decision is not reviewed by this Court. The Railroads' effort to eliminate Section 2 Seventh through judicial action should be denied by a grant of BMWE's Petition.

The Railroads' final argument against the Petition is that there is no harm in the minor dispute finding because BMWE will have the opportunity to persuade an arbitrator that the Union is correct on the merits. Brief in Opp'n at 14. As this Court held in *Conrail,* however, that is not the way the statute was designed; only if a carrier can demonstrate that its contract interpretation is arguably jusified under the terms of the parties' agreement is the union required to arbitrate the dispute. As BMWE demonstrated in its Petition, (Pet. at 8-9, 16-17, 20), the RLA does not require arbitration for all disputes; it specifically directs contract change disputes to a notice, negotiation, and status quo process. A unilateral change effected by management without compliance with that process but under the guise of a contract interpretation that can not even arguably be justified under existing contract terms is inconsistent with the statute. The classification of such dispute as minor prevents strikes, but does so by overriding a key component of the RLA, by vitiating the statutory balance between the mechanisms for resolution of disputes over changes in agreements and disputes over interpretation of agreements, and by negating the established Norris-LaGuardia Act ban on anti-strike injunctions except where strikes are prohibited under the labor laws. Consequently, the fact that BMWE

could obtain an arbitration decision on the merits of the travel allowance dispute does not ameliorate the harm to the statutory scheme that will result if the decision below is allowed to stand.

CONCLUSION

The Court should grant the writ sought by BMWE, and review and reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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